Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-894

PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR., and wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and wife, NANCY B. IRVIN, DORIS IRVIN EGERTON and Husband, GEORGE G. EGERTON,

Petitioners,

v.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

Page

Table of Authorities ii

Introductory Note 1

Opinions Below 2

Jurisdiction 2

Statutes, Constitutional Provisions 2

Statement 3

Argument 3

I Necessity for Acquisition 4

II Alleged Failure to Comply with Statutory Requirements 5

III Denial of Trial by Jury on Issues of Necessity and "conditions precedent" 7

IV The Decision of the Appellate Court 8

Conclusion 9

TABLE OF AUTHORITIES

Statutes

28 U.S.C.A. Sec. 1257(3) 2

42 U.S.C.A. Sec. 4321 6

49 U.S.C.A. Sec. 1716(c) (3) (4) (d) (e) 6, 7

Chapter 40, General Statutes of North Carolina ... 3

Cases

Kaperonis v. Highway Commission, 260 N.C. 587, 133 S.E. 2d 464 (1963) 4

Board of Education v. Allen, 243 N.C. 520, 91 S.E. 2d 180 (1956) 4

In Re Housing Authority, 235 N.C. 463, 70 S.E. 2d 500 (1952) 4

Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922) 4

Power Co. v. Wissler, 160 N.C. 687, 133 S.E. 464 (1912) 4

Mount Olive v. Cowan, 235 N.C. 259, 69 S.E. 2d 529 (1952) 5

Town of Windsor v. Ronair, 329 F.Supp. 1286 (D.C. — N.Y. 1971) 6

City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E. 2d 179 (1972) 7

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INTRODUCTORY NOTE

For purposes of clarity, we point out that in the condemnation proceeding brought by the Greensboro-High Point Airport Authority, as well as in the Findings of Fact, Conclusions of Law and Judgment of the Superior Court and in the opinion and judgment

of the North Carolina Court of Appeals, the Airport Authority (Respondent here) is designated as "Petitioner" and the land owners (Petitioners here) are designated as "Respondents." However, in order to conform to the designation appropriate to this Petition for Writ of Certiorari, the Airport Authority will be referred to in this Brief as the Respondent and the land owners as Petitioners. All italics in the text of this Brief are supplied unless otherwise noted. Page references to the Appendix to Petition are designated: (App. p. ——).

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Superior Court of Guilford County, North Carolina, appear at App. p. C-1 through C-33, inclusive. The opinion of the North Carolina Court of Appeals to which this Petition for Certiorari is directed is set forth at App. p.A-1 through A-36 inclusive. The judgment of the North Carolina Supreme Court dismissing the appeal and denying Petition for Discretionary Review appears at App. p. B-1 through B-3, inclusive.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered 7 September 1978. The petition for certiorari was filed on December 5, 1978. Jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C.A. Sec. 1257(3).

STATUTES, CONSTITUTIONAL PROVISIONS

Petitioners have set forth numerous provisions of the United States and North Carolina constitutions, as well as provisions of the United States Code and North Carolina General Statutes, which they contend are involved in their petition. Respondent has nothing to add to those enumerated by Petitioners.

STATEMENT

On 1 July 1975, Greensboro-High Point Airport Authority (Respondent here) filed a condemnation proceeding pursuant to Chapter 40, General Statutes of the State of North Carolina, seeking to acquire fee simple title to a 90.35 acre tract owned by Petitioners for purposes of expansion of the Greensboro/High Point/Winston-Salem Regional Airport. The land owners (Petitioners here) interposed numerous procedural objections by challenging, *inter alia*, the necessity of the taking, the sufficiency of the effort to acquire the land by negotiations, the constitutionality of the taking, and denied in general all material allegations of the Authority's petition. In accordance with the prescribed statutory procedure, hearings were had, testimony was taken, exhibits filed and arguments presented. Thereupon, the Court made exhaustive Findings of Fact, set forth its Conclusions of Law and entered judgment overruling the objections asserted by the land owners. (App. p. C-1 through C-33, inclusive). On appeal to the North Carolina Court of Appeals, the judgment of the Superior Court was in all respects affirmed. (App. p. A-1 through A-36). Thereafter the North Carolina Supreme Court (1) dismissed the "Appeal as a Matter of Right" and (2) denied Discretionary Review. This placed the prceeding in a posture where the next step would be the trial by jury of the issue of the amount of just compensation due the land owners. However, Petitioners elected to petition this Court for a writ of certiorari upon the same grounds presented to and denied by the North Carolina Supreme Court.

ARGUMENT

Petitioners endeavor to present to this Court, as substantial constitutional questions: (1) the refusal of the Court to dismiss the proceeding on the grounds of "no

present necessity" for taking, (2) failure of Court to require the condemnor to comply with certain statutory conditions precedent to condemnation and (3) denying petitioners a jury trial on these issues. Their complaints, on the record before this Court, are without merit.

I

Necessity for Acquisition of Petitioners' Land

The question of necessity was the subject of substantial and conclusive proof by the Airport Authority. Testimony and exhibits disclosed a continually updated Master Plan for expansion of its facility which included Petitioners' property for use as a cargo handling area and related facilities (App. p. C-17). Specific Findings of Fact declare that public interest and public necessity required the Authority to acquire the lands in question "for the use and benefit of petitioner and the public." (App. p. C-21, 22, 23).

The law in respect to the constitutional aspects of the necessity of taking has been the subject of a conclusive judicial determination in connection with eminent domain proceedings. *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464 (1963). North Carolina courts have long held that a decision as to need or necessity is a legislative matter and not a subject for judicial inquiry and that it is conclusive upon the Court unless the property owner desiring to question the decision of need for a public purpose by the governing body *alleges* and proves bad faith, malice, wantonness or oppressive and manifest abuse of discretion by the condemnor. *Board of Education v. Allen*, 243 N.C. 520, 91 S.E. 2d, 180 (1956); *In Re Housing Authority*, 235 N.C. 463, 70 S.E. 2d, 500 (1952); *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922); *Power Co. v. Wissler*, 160 N.C. 687, 133 S.E. 464 (1912). Since Petitioners made no such allegations in their pleadings or attempted to offer any proof of this

nature, they were in no position to question the Authority's determination for need and the decision of the Court below was in accord with this rule.

Notwithstanding the rule set forth in the cases cited above, there was a substantial volume of evidence upon which the Trial Court predicated its Findings of Fact (App. p. C-21, 22, 23) that the taking of Petitioners' land was necessary, conceding that the word "necessary" means for use within a reasonable time. Respondent was required to prove, *and did prove*, that a determination had been made by the governing body of the Authority that Petitioners' property should be condemned for use in expansion of the airport, that the purpose for which it should be condemned was a public purpose and that the determination of the need and purpose was made in good faith. The burden of proof on this issue was met and the fact determined. This, in essence, is precisely what the Court of Appeals held on the question of necessity of taking.

II.

Alleged Failure to Comply with Statutory Requirements

The second point raised in the petition is so vague as to virtually justify no response. Petitioners apparently claim denial of due process because of failure to comply with certain statutes relating to negotiations prior to condemnation, the location of a "dwelling" house on the property condemned and environmental requirements. To begin with these are not constitutional questions at all. The matter of "negotiations" was fully treated by the Court below and the statutory mandate of the North Carolina act was found to have been fully met. The "dwelling house" issue involved a statutory interpretation (G.S. 40-10) and was summarily dismissed by the Court of Appeals (App. p. A-33, 34) by citing the applicable law as set forth in *Mount Olive v. Cowan*,

235 N.C. 259, 69 S.E. 2d 529 (1952). Lastly, under this point Petitioners claim they were denied due process in that Respondent failed to comply with the conditions precedent to this condemnation as the same are established by the National Environmental Policy Act of 1969, as amended, (42 U.S.C.A. Sec. 4321, et seq.) and Sections 1716 (c) (3) (4) (d) (e) of the Airport and Airways Development Act (49 U.S.C.A. Sec. 1701, et seq.). Whatever reasons Petitioners have for contending that this proceeding is unconstitutional because Respondent has not complied with certain conditions precedent invoked by the two Federal Statutes cited are nebulous and undefined. Petitioners mention these statutes and cite their provisions, without more. No authority is cited that these statutes prescribe constitutional conditions precedent to eminent domain proceedings.

Furthermore, there is no evidence of any type in the record that the provisions of the National Environment Policy Act of 1969 applied to the Respondent in this proceeding in any manner and, even if they do, there is no evidence that the appropriate agencies of the Federal Government did not and are not complying with its provisions. Indeed, a negative declaration was obtained through the Federal Aviation Administration.

Likewise, there is no evidence that the provisions of 49 U.S.C.A. Sec. 1716 (c) (3) (4) of the Airport and Airways Development Act are applicable to this proceeding and, if they are, there is no evidence that its provisions have not been complied with to the extent that they may be applicable. Even if there had been evidence that the provisions have not been complied with, this does not affect this proceeding or constitute a violation of petitioners' constitutional rights. *Town of Windsor v. Ronair*, 329 F. Supp. 1286 (D.C. — N.Y. 1971).

III.

Denial of Trial by Jury on Issues of Necessity and "the conditions precedent"

Finally, Petitioners claim a denial of due process by reason of the denial of a trial by jury on the issues of necessity and "the conditions precedent." Once again Petitioners vaguely suggest their constitutional rights are violated by reason of the judicial determination of the question of necessity. A review of the opinion of the Court of Appeals clearly demonstrates the lack of substance to this contention. Furthermore, a review of the only case cited by Petitioners in support of its position (*City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972)) discloses that it is direct and persuasive authority against the contention which they assert and stands for the proposition: "In any condemnation proceeding the question of what is a public purpose is one for the Court." In *McNeely* the landowners alleged "bad faith" and also alleged that the taking was pursuant to a "diabolical and reprehensible scheme" for which no public necessity existed. This question was determined by the Court and the proceeding dismissed.

The record before this Court establishes that the proceeding below was in total accord with long established principles of eminent domain, and particularly Chapter 40 of the General Statutes of North Carolina.

Petitioners conclude with a totally unsupported claim to "equal treatment" under the "Airport Act, 49 U.S.C.A. Sec. 1716(c) (3) (4) (d) (e) and National Environmental Policy Act of 1969." The record reflects adequate and complete compliance with NEPA by the acquisition through the Federal Aviation Administration of the required statement. The evidence is that this met the requirements imposed upon the FAA in approving Respondent's project. Petitioners at no time

undertook to challenge the sufficiency of the statement. Their sole citation of authority appears to flow from unsupported allegations contained in their answer to the original petition filed in this cause with these allegations being carried forward in their brief as "evidence" — in a vain attempt to bolster and patch up a record which is totally void of support for the contentions they now assert.

IV.

The Decision of the Appellate Court is Correct

Petitioners attack the decision of the North Carolina Court of Appeals as "questioning" the validity of the National Environmental Policy Act of 1969, as Amended, 42 U.S.C.A. Sec. 4332 (A) (C) and the Airport Act, 49 U.S.C.A. Sec. 1716(c) by failing to go out of its way to hold that Respondent was required to hold hearings, make environmental determinations and "otherwise comply" with these statutes before instituting condemnation proceedings. Contrary to Petitioners' broadside fusilade, the record clearly indicates that statutory compliance was met since such compliance was a pre-requisite to approval of the grant from the F.A.A. for the project which consisted solely of land acquisition. A review of the record and the opinion below reflects the fact that these questions were not carried forward as assignments of error on the appeal from the Trial Court and were belatedly attempted to be raised in the abortive "Appeal as a Matter of Right" (which was dismissed) and the "Petition for Discretionary Review" (which was denied) by the North Carolina Supreme Court.

CONCLUSION

There are no substantial constitutional questions involved in the Petition. The challenge of Petitioners is without merit. For the reasons above set forth, Respondent respectfully requests this Court for the entry of an order denying the Petition for a Writ of Certiorari.

Respectfully submitted,

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